**No. 19-7346**

# United States Court of Appeals
## FOR THE FOURTH CIRCUIT

**JAMES PAUL DESPER,**
Plaintiff - Appellant,

**v.**

**HAROLD CLARKE, *et al.*,**
Defendants - Appellees.

**Appeal from the United States District Court for the Western District of Virginia**

## APPELLANT'S REPLY BRIEF


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## ARGUMENT

Arguing vociferously against claims Mr. Desper never asserted, Defendants fail to rebut those he raised. Namely, Defendants argue that Mr. Desper lacks an unfettered constitutional right to in-person visitation and that the Virginia Department of Corrections' (VDOC's) policy restricting visitation between those convicted of sex offenses and minor children is constitutionally valid on its face. Mr. Desper neither asserted such a broadly sweeping right nor raised a facial challenge to the policy. Rather, he argued that the Constitution protects him and his minor daughter, K.D., from Defendants' arbitrary and indefinite denial of all opportunity to see one another's faces.

Because Defendants misstate Mr. Desper's claims, they do not meaningfully engage with the substance of his allegations: that Defendants' five-year-and-counting denial of all visitation with K.D., admittedly for "no specific reason," JA300, violates his constitutional rights. Rather than asking whether these allegations plausibly show arbitrariness, Defendants repeatedly invert the pleading standard, asking instead whether VDOC plausibly could have had reasons for denying visitation.

Defendants' conduct impermissibly infringed on Mr. Desper and K.D.'s protected parent-child relationship under the First Amendment, Due Process Clause, and Equal Protection Clause. This Court should reverse and remand for further proceedings, including discovery.

## I. Defendants Do Not Dispute that the First Amendment Prohibits VDOC Officials from Indefinitely Denying Visitation Between Mr. Desper and His Minor Daughter Without a Legitimate Penological Justification.

Defendants agree that a parent's relationship with his minor child is "undoubtedly important." Response Br. 15. But they assert that an incarcerated person holds no "freestanding" First Amendment right to "in-person visitation with minor children" and that VDOC's policy barring certain parent-child visitation absent exemption is constitutional even if such a right exists. *Id.* at 16.[1] Perhaps. But those arguments never address the issue Mr. Desper presented to this Court: Does the First Amendment permit VDOC officials to indefinitely extinguish—"for no

[1] Defendants also argue in a two-sentence footnote that Mr. Desper "makes no showing of eligibility for punitive damages." Response Br. 15 n.2. That argument is premature. Defendants never advanced any distinct grounds in the district court for dismissing Mr. Desper's punitive damages claims, and the district court accordingly never ruled separately on those claims. This Court should not resolve this unbriefed issue raised for the first time on appeal.

legitimate reason"—all forms of visitation between Mr. Desper and K.D., his minor child who wishes to see him? JA301. It does not.

### A. Defendants Ignore Facts in Mr. Desper's Complaint Alleging an Arbitrary and Indefinite Visitation Denial and Cite No Cases Involving Such a Denial.

Defendants first argue that this case fails to implicate any constitutional protection because, in their view, Mr. Desper's complaint alleged only that prison officials twice denied him an exemption from their visitation policy—not that they denied him visitation with K.D. arbitrarily and indefinitely. *See* Response Br. 17. But this argument ignores facts in Mr. Desper's complaint alleging just such an arbitrary and indefinite denial. JA 294–300. And although Defendants go on to argue that Mr. Desper has no general, or "freestanding," First Amendment right to in-person visitation with his minor child, K.D., the cases Defendants cite do not address the type of arbitrary and indefinite deprivation Mr. Desper actually alleged. *See* Response Br. 16, 18–20.

Mr. Desper's complaint expressly claimed that Defendants "deprived [him] of the privilege of visiting with his daughter for no legitimate reason." JA301; Opening Br. 26–30. And he supported this claim with detailed factual allegations:

- Defendants permitted K.D. to visit Mr. Desper for more than six years without incident, before and after enactment of VDOC's policy restricting visitation. *See* JA294–95, JA297.

- Defendants then abruptly and without notice removed K.D. from Mr. Desper's approved visitation list. *See* JA294–95.

- Even after Mr. Desper began applying for an exemption to the visitation restrictions, Defendants gave no timely notice about the status of his requests. *See* JA294–300.

- A VDOC official told K.D.'s guardian that "there was no specific reason" for denying visitation. *See* JA54, JA300.

- Defendants have now denied Mr. Desper all visitation—in-person, non-contact, video—with K.D. for more than five years without offering a reason specific to Mr. Desper and K.D., and they continue to do so.[2] *See* JA297–300.

Mr. Desper did not need to state any "precise magical words" to assert that VDOC's ongoing denial of visitation is arbitrary and indefinite. *See Tobey v. Jones*, 706 F.3d 379, 385 (4th Cir. 2013). These allegations more than sufficed.

Defendants never argue that the First Amendment permits indefinite, arbitrary denials of all forms of visitation between

[2] Defendants argue that their denial of visitation is not indefinite because it "simply involves Desper's inability to obtain an exemption" to VDOC's visitation restrictions "on two occasions." Response Br. 38 n.12. Yet the denial is indefinite. Due to VDOC's continuous and unexplained denials, Mr. Desper and K.D. have not seen each other for more than five years and do not know when they will again share a face-to-face conversation.

incarcerated parents and their minor children who wish to see them. In fact, such an argument would contradict "the weight of authority." *Easterling v. Thurmer*, 880 F.3d 319, 322–23, 323 n.6 (7th Cir. 2018); *see* Opening Br. 20–21. Instead, Defendants cite cases with very different facts involving: legitimate case-specific justifications for suspending visitation based on an individual's behavior in prison,[3] time-limited suspensions,[4] restrictions on only some forms of visitation,[5] and facial challenges to prison visitation polices.[6] Response Br. 18–20.[7]

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[3] *See, e.g.*, *White v. Keller*, 438 F. Supp. 110, 113 (D. Md. 1977), *aff'd*, 588 F.2d 913, 914 (4th Cir. 1978) (punishment for possessing contraband after visitation); *Wirsching v. Colorado*, 360 F.3d 1191, 1194–95, 1200 (10th Cir. 2004) (consequence of refusal to complete a sex offender treatment program).

[4] *See, e.g.*, *White*, 438 F. Supp. at 115 (90-day suspension).

[5] *See, e.g.*, *Oxendine v. Williams*, 509 F.2d 1405, 1407 (4th Cir. 1975) (rejecting plaintiff's right to "physical contact" visitation); *see also Wirsching*, 360 F.3d at 1201 ("Prison officials . . . should seriously consider less draconian restrictions—such as closely monitored, noncontact visitation.").

[6] *See, e.g.*, *Ramos v. Lamm*, 639 F.2d 559, 580 (10th Cir. 1980) (rejecting facial challenge to prison regulation allowing five to ten monthly visitation days).

[7] In addition, Defendants cite unreasoned, unpublished dispositions rejecting claims to visitation. Response Br. 18–19 (citing cases such as *Propps v. West Virginia Dep't of Corr.*, 166 F.3d 333 (4th Cir. 1998)). Such decisions "have no precedential value, and they are entitled only to the weight they generate by the persuasiveness of their reasoning." *Collins v. Pond Creek Mining*, 468 F.3d 213, 219 (4th Cir. 2006) (internal quotation marks omitted).

None of these cases consider visitation restrictions as arbitrary and indefinite as those alleged here, let alone preclude Mr. Desper's claim. In fact, one of Defendants' cited cases expressly recognizes that the "constitutional question" of whether an incarcerated father may lawfully be even "*temporarily* deprived of his visitation privileges with his own children" is "by no means open and shut." *Dunn v. Castro*, 621 F.3d 1196, 1205 (9th Cir. 2010) (emphasis added) (citation omitted). This Court should not now depart from its sister circuit's recognition that "a sex offender[] who alleges that a permanent ban on visits with his minor children has no legitimate justification states a valid constitutional claim." *See Easterling*, 880 F.3d at 322–23; Opening Br. 20–23 (noting that multiple circuits have recognized similar constitutional protections).

### B. The *Turner* Analysis Evaluates Defendants' Application of VDOC's Regulation to Mr. Desper and K.D., Not the Regulation's Facial Validity.

If this Court holds that Mr. Desper adequately alleged arbitrary visitation restrictions affecting a First Amendment right, both parties agree that the four-factor standard outlined in *Turner v. Safley*, 482 U.S. 78, 89–91 (1987), governs the constitutionality of those restrictions. Response Br. 20. But Defendants' *Turner* analysis rests on their belief

that, under *Turner*, this Court may consider only the facial validity of VDOC's regulation, instead of the validity of Defendants' application of that regulation in Mr. Desper's case. *See* Response Br. 20–29. That belief is unequivocally wrong. And Defendants' *Turner* analysis is correspondingly flawed.

*Turner* allows Mr. Desper to raise a case-specific First Amendment challenge to VDOC's application of its regulation to him and his daughter. Indeed, "controlling Supreme Court precedent" recognizes that individuals like Mr. Desper "may pursue as-applied challenges to facially valid prison regulations." *Flagner v. Wilkinson*, 241 F.3d 475, 483 n.5 (6th Cir. 2001) (citing *Thornburgh v. Abbott*, 490 U.S. 401, 403–04 (1989)); *see also Overton v. Bazzetta*, 539 U.S. 126, 134 (2003) (acknowledging a plaintiff's ability to challenge "a particular application of [a visitation] regulation"); *Jehovah v. Clarke*, 798 F.3d 169, 180–81 (4th Cir. 2015) (recognizing as-applied First Amendment challenge to prison housing regulation).[8] Therefore, this Court's *Turner* analysis must focus on Mr.

[8] Defendants are also wrong to suggest that Mr. Desper's as-applied challenge threatens the VDOC regulation, disturbs the deference afforded to prison officials, and "sound[s] much more in due process than the First Amendment." Response Br. 22–24. Mr. Desper does not seek to

Desper's claim that VDOC arbitrarily applied its regulation to him and K.D.—not the validity of the regulation as a whole.

But Defendants offer this Court no guidance in conducting the proper analysis because they consider only whether the text of VDOC's regulation withstands *Turner* scrutiny. As Mr. Desper has explained, all four *Turner* factors weigh in his favor. *See* Opening Br. 25–30. And, to the extent Defendants raise hypothetical concerns about prison administration, *Turner* requires an opportunity for evidentiary development. *See* Response Br. 20–29; Opening Br. 28–29; *see also, e.g.*, *Wolf v. Ashcroft*, 297 F.3d 305, 310 (3d Cir. 2002) ("[C]ourts of appeals ordinarily remand to the trial court where the *Turner* factors cannot be assessed because of an undeveloped record.").

For the first *Turner* factor, Defendants' attempts to justify the facial validity of VDOC's regulation never respond to Mr. Desper's allegation that there was "no specific reason"—let alone a legitimate penological justification—for denying visitation between him and K.D. JA300.

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void VDOC's visitation policy. And *Turner*, which "provides the test for evaluating prisoners' First Amendment challenges," inherently affords deference to prison officials in both facial and as-applied claims. *Shaw v. Murphy*, 532 U.S. 223, 229–32 (2001).

*Compare* Response Br. 22 (defending the regulation's text), *with supra* Section I.A (recounting Mr. Desper's allegations of arbitrary application). Mr. Desper's allegations on the first *Turner* factor are therefore dispositive, "irrespective of [which way] the other factors tilt." *See Shaw*, 532 U.S. at 229–30; *Turner*, 482 U.S. at 89–90; *Jehovah*, 798 F.3d at 181.

This Court need go no further. But even if it chooses to reach the remaining *Turner* factors, Defendants' arguments are unpersuasive.

For the second *Turner* factor—alternative means of exercising one's associational rights—Defendants cite *Overton* to argue that phone calls and letters are necessarily sufficient to safeguard those rights. Response Br. 24–25. But the *Overton* Court did not consider regulations that barred parent-child visitation, and it reached its conclusion on the sufficiency of phone calls and letters for communicating with minor children *outside* the immediate family only after discovery and a trial. *See* 539 U.S. at 131–33. Defendants ignore that—ever since 2015 when K.D. was nine years old—their visitation ban has damaged Mr. Desper's ability to serve as his minor daughter's only involved parent. Opening Br. 20–24. And the ban threatens further damage the longer it persists through K.D.'s formative years. *Id.*

For the third *Turner* factor, how visitation impacts institutional safety and resources, Defendants concede that VDOC routinely accommodates visitation between other inmates and their minor children and that Mr. Desper and K.D. have already shared six years of safe visitation in VDOC facilities. *See* Response Br. 15, 27. They offer no actual reason why facilitating visits between Mr. Desper and K.D. would impose additional burden, instead arguing that this Court's review of Mr. Desper's claim will interfere with the deference afforded to VDOC officials. *See id.* But the pleading-stage record contains no reasoned institutional judgments to which this Court could defer. *See Shakur v. Schriro,* 514 F.3d 878, 887 (9th Cir. 2008) (holding that deference did not require the court to accept prison officials' assertions "[w]ithout more detailed findings").

Finally, Defendants do not dispute that non-contact or video visitation are obvious regulatory alternatives that VDOC officials have failed to offer Mr. Desper and K.D. *See* Response Br. 28. Nor do they respond to Mr. Desper's claim that the feasibility of alternative visitation formats cannot be resolved on this limited record. *See id.* Instead, Defendants claim Mr. Desper "never directed the district court's

attention" to the alternatives that he undisputedly set out in his "77-page initial filing." *Id.* Yet Mr. Desper identified those alternatives before the district court not only in his initial filing but also subsequently. *See* JA45–46, JA49–50 (attachment to initial complaint); JA260 (objecting, in summary-judgment filing, to Defendants' "denial of all forms of visitation, such as contact, non-contact and video"); JA247 (pointing out in summary-judgment filing that "Desper is deprived of all visitation with his daughter, including contact, non-contact and video"); ECF No. 20-1, at 4 (expressing openness to other visitation formats in discussion of fourth *Turner* factor in summary-judgment filing).

## II. Defendants' Due Process Arguments Focus on a Liberty Interest Mr. Desper Never Asserted and Legal Standards He Need Not Meet.

Defendants maintain that Mr. Desper has stated neither a procedural nor a substantive due process claim.[9] They are wrong on both counts. Defendants' procedural due process arguments misidentify the liberty interest Mr. Desper asserts and wrongly suggest that the process

[9] Defendants contend that Mr. Desper's complaint "does not specify whether his due process claim sounds in substantive or procedural due process." Response Br. 29. But Mr. Desper was not required to "specifically label a claim under a due process heading" in order to raise it. *King v. Rubenstein*, 825 F.3d 206, 222 (4th Cir. 2016).

VDOC policy affords on its face precludes Mr. Desper's challenge to the inadequate process *he* received. Defendants' substantive due process arguments misstate the threshold requirement for unconstitutionally conscience-shocking behavior and misread this Court's pleading requirements.

### A. Procedural Due Process Protections for Mr. Desper and K.D.'s Parent-Child Relationship Do Not Evaporate at the Prison Gate.

Defendants argue that Mr. Desper has no protected liberty interest in in-person visitation with K.D. and that, facially, VDOC policy affords adequate process to protect any liberty interest that does exist. These arguments do not respond to the retained liberty interest Mr. Desper claims in his parent-child relationship with his minor daughter. Nor do Defendants' arguments recognize that Mr. Desper challenged the constitutionally inadequate process he was afforded, not the VDOC policy's facial validity.

#### 1. Mr. Desper Holds a Protected Liberty Interest in Maintaining His Relationship with His Minor Daughter.

Mr. Desper's liberty interest in maintaining his relationship with K.D. finds alternative and independent bases in (a) the Due Process

Clause and (b) VDOC's review procedures. Defendants fail to rebut either one.

a. Defendants argue that the Constitution does not "confer on Desper a liberty interest in in-person visitation." Response Br. 30. But Mr. Desper has claimed a different, narrower interest in "fostering parent-child companionship, care, and upbringing through visitation" with his minor daughter, K.D. Opening Br. 36. In prison, that interest requires only a form of face-to-face visitation necessary for K.D. "to know that she's loved," JA53, and for them to maintain their relationship—not "unfettered visitation," *Kentucky Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989), nor any other unqualified "constitutional right to visitation," *see* Response Br. 31–32 (quoting *Williams v. Ozmint*, 716 F.3d 801, 806 (4th Cir. 2013)).

Defendants concede the "undeniable importance of the parent-child relationship," Response Br. 33, which this and other courts have repeatedly recognized. And Defendants dispute neither that Mr. Desper had a protected liberty interest in this relationship prior to his incarceration, nor that he retains "important and significant" elements of that liberty interest, including the expression of emotional support,

commitment, and personal dedication, *Turner*, 482 U.S. at 95–96, during his incarceration. Instead, while acknowledging that this Court has not yet decided whether a "prisoner has a constitutionally protected liberty interest [in] in-person visitation with his children," Defendants appear to suggest that face-to-face communication is unnecessary for Mr. Desper and K.D. to safeguard the essential attributes of their relationship. Response Br. 33.

Defendants argue that this Court implicitly resolved this question when it examined the associational rights of adult inmates and *their* parents. *See id.* (citing *White*, 588 F.2d 913). Not so. The due process protections afforded to the relationship between a parent and his minor child—such as the one Mr. Desper seeks to maintain here—are meaningfully distinct. *See* Opening Br. 36–37; *McCurdy v. Dodd*, 352 F.3d 820, 827 (3d Cir. 2003) (explaining that Supreme Court precedent is "clear" that "cases extending liberty interests of parents under the Due Process Clause focus on relationships with *minor* children").

Defendants look away from the reality that, for a father and his fourteen-year-old daughter, communicating face to face is necessary to preserve the protected attributes of their relationship. Opening Br. 38.

Instead, Defendants attempt to show a "stark contrast" between this case and *Turner*, which recognized prisons' need to safeguard comparable attributes of the constitutionally protected marital relationship. Response Br. 33 n.9; *see Turner*, 482 U.S. at 95–96. They suggest that the prison regulation invalidated there for impermissibly impinging on that relationship "prohibit[ed] altogether most opportunities for marriage," while VDOC regulations allow Mr. Desper to maintain the essential elements of his relationship with K.D. Response Br. 33 n.9. But Defendants offer no explanation as to how VDOC regulations do so.

None of Defendants' cited cases upholding certain visitation restrictions approve of what Defendants continue to do here: arbitrarily and indefinitely deny a biological parent, who holds parental rights and has no history of visitation violations, any visual contact with his minor child who wants to see him. Not one. For example, Defendants cite *Thompson* and *White* to establish the constitutionality of denying access to particular visitors in a prison environment. *See* Response Br. 31, 33. Both cases declined to find a constitutional right to visitation where there was evidence of past misconduct during visits. *See Thompson*, 490 U.S.

at 458–460; *White*, 438 F. Supp. at 113–115.[10] So neither case bears on the liberty interest Mr. Desper asserts.

b. Defendants rely on VDOC regulations' presumptive visitation bar for people convicted of sex offenses to argue against Mr. Desper's alternate—and independently sufficient—basis for a liberty interest arising from those regulations. Response Br. 34. They fail to respond to Mr. Desper's argument that, by using mandatory language to establish a process *requiring* VDOC to review applications for an exemption to the visitation bar, VDOC regulations limit official discretion to withhold visitation.[11] Defendants then argue that denying "in-person visitation" with one's minor child does not "impose[] atypical and significant hardship." *See* Response Br. 36 (quoting *Sandin v. Conner*, 515 U.S. 472,

[10] Defendants also cite *Williams* to suggest the absence of a constitutional right to visitation, *see* Response Br. 31–32, but that qualified immunity case, examining a two-year suspension of visitation where a prison official observed evidence of contraband after a visit, has no bearing on this case. *See Williams*, 716 F.3d at 803–04, 806–07.

[11] Defendants fail to address Mr. Desper's argument that VDOC regulations suggest that identifiable substantive criteria guide the decision to grant or deny an exemption. *See* Opening Br. 40. At a minimum, discovery is necessary to explore precisely what those criteria are.

484 (1995)). But they reach this striking conclusion only by gauging atypicality against the wrong baseline.

As Mr. Desper has noted, regulations mandating review of confinement conditions can establish a liberty interest in avoiding those conditions. Opening Br. 39–40; *see Incumaa v. Stirling*, 791 F.3d 517, 527 (4th Cir. 2015). Defendants never explain why the regulatory provisions requiring them to review applications for an exemption from the visitation ban differ meaningfully from the provisions in *Incumaa* mandating periodic review of an inmate's placement in security detention. *See* 791 F.3d at 527. Instead, citing both *Thompson* and *Caraballo-Sandoval v. Honsted*, 35 F.3d 521, 525 (11th Cir. 1994), Defendants suggest that Mr. Desper's claim fails because the regulations lack explicitly mandatory language guaranteeing visitation rights. Response Br. 35. However, neither of those cases examined regulatory provisions that, as here, used explicitly mandatory language to establish a process for periodically reviewing restrictive visitation conditions. *See Thompson*, 490 U.S. at 457–58; *Caraballo-Sandoval*, 35 F.3d at 525.[12]

[12] Defendants separately contend that "a prison official's failure to abide by a procedural regulation does not, in and of itself, create a due process

Defendants next argue that, even if VDOC regulations gave rise to an interest in visitation with his minor daughter, Mr. Desper has failed to show that denying him that visitation "imposes atypical and significant hardship relative to the ordinary incidents of prison life." Response Br. 36 (quoting *Sandin*, 515 U.S. at 484). Defendants never challenge that an arbitrary and indefinite denial of parent-child visitation would impose atypical and significant hardship relative to the ordinary experience in the general prison population. Instead, Defendants claim only that hardship for Mr. Desper should be compared to hardship for "a sex offender." *Id.* at 38. They cite no case that supports such a baseline.

In fact, this Court has never shifted the baseline in the way Defendants suggest. Rather, "the general prison population" represents the baseline in cases where additional confinement conditions were placed on a person sentenced to confinement in the general population, as opposed to cases where a person was sentenced to death, triggering

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violation." Response Br. 36 n.11. This is beside the point. Mr. Desper argues that the arbitrary and indefinite denial of visitation imposed here—not some failure to abide by a particular procedural regulation—impinged on his alternate liberty interest arising out of VDOC's mandatory review provisions. *See* Opening Br. 39–40.

"automatic[]" pre-execution confinement on death row. *Incumaa*, 791 F.3d at 528–29 (general population); *Prieto v. Clarke*, 780 F.3d 245, 254 (4th Cir. 2015) (death row).

### 2. Mr. Desper Challenges the Constitutionally Inadequate Process He Received, Not the Facial Validity of VDOC Regulations.

Alongside a protected liberty interest under either the Constitution or VDOC regulations, Mr. Desper plausibly showed that Defendants did not afford him minimally adequate process. Defendants contend that "VDOC's procedures satisfied any constitutional requirements that may have attached." Response Br. 38. They argue both that Mr. Desper's complaint "contains no plausible factual basis" for inferring that VDOC arbitrarily denied his applications for an exemption to the visitation ban and that "nothing in [VDOC] policy requires officials to furnish . . . a reason" for these denials. Response Br. 39. Accordingly, Defendants seem to argue that: (1) although an arbitrary denial of an application may violate due process, Mr. Desper has not plausibly shown such a denial, and (2) the Due Process Clause does not require them to furnish Mr. Desper with a reason for the denials of his applications. *See* Response Br. 38–39. Defendants are wrong on both points.

First, Defendants seem to concede that arbitrary denial of an application would represent inadequate process. So they instead contend that Mr. Desper's allegations did not plausibly suggest such a denial. *See* Response Br. 39. Wrong. Mr. Desper alleged among other things that VDOC staff told K.D.'s guardian that "there was no specific reason" for the denial of visitation, JA300, and thereby plausibly asserted that Defendants acted in an arbitrary manner, *see* Opening Br. 31–34; *see also* Sections I.A, II.B (discussing arbitrariness).

Second, Defendants suggest that Mr. Desper was afforded adequate process even if Defendants failed to provide him with a reason for the denial of his applications to resume visitation with K.D. But by failing to provide any reason for the denials and affirmatively stating that "there was no specific reason" for them, JA300, Defendants not only obstruct any "viable path to release," *Smith v. Collins*, 964 F.3d 266, 278 (4th Cir. 2020), from the visitation restriction but also increase the "risk of erroneous deprivation"—a critical inquiry under this Court's factor-based test for adequacy of process, *see Lovelace v. Lee*, 472 F.3d 174, 202 (4th

Cir. 2006); *see also Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (establishing three-factor test).[13]

In defending adequacy of process, Defendants artificially heighten the pleading standard by picking and choosing portions of the record to tell their own story about the denial of visitation. Specifically, they seize on vague references to Mr. Desper's mental health in his court filings and speculate about the role it might have played in VDOC's determinations. *See* Response Br. 39 & n.13. In so doing, Defendants misapply the Rule 12(b)(6) standard in two different ways. First, rather than "accept[ing] as true" the complaint's factual allegations, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), Defendants offer rationales VDOC might (or might not) have had for denying Mr. Desper an exemption. Second, rather than drawing all reasonable factual inferences in Mr. Desper's favor and asking whether it is plausible that VDOC made its decision arbitrarily, they ask

[13] Notably, Defendants identify the *Mathews* test but fail to apply it. *See* Response Br. 38–39. One possible reason for this omission is that, as this Court has recognized, "adequacy-of-process issue[s]" present a "clear need for further discovery," where courts inquire into information "plainly relevant to the risk of erroneous deprivation," like "the application of VDOC's review procedures" and any "additional . . . layers of review that existed under VDOC policy." *Smith*, 964 F.3d at 281–82.

whether it is plausible that VDOC could have had a reason for denying his applications. *See* Response Br. 39 & n.13.

### B. Defendants Sidestep Facts Showing a Substantive Due Process Violation and Wrongly Read an Intent Requirement into the Conscience-Shocking Standard.

Defendants contend that Mr. Desper failed to allege the requisite conscience-shocking behavior for his substantive due process claim.[14] Such behavior, in Defendants' view, requires conduct "intended to injure." Response Br. 42. But Defendants misread precedent, which establishes that arbitrary executive action can shock the conscience, even absent malicious intent.[15] And Mr. Desper's claim is grounded in specific allegations that affirmatively show such action.

Defendants acknowledge that the "shocks-the-conscience test 'derives ultimately from the touchstone of due process which is protection of the individual against arbitrary action of government.'" Response Br. 41 (quoting *Hawkins v. Freeman*, 195 F.3d 732, 742 (4th Cir. 1999)). They

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[14] Defendants suggest that Mr. Desper pursues either an executive action theory or a legislative action theory. Response Br. 40. He pursues the former.

[15] Defendants also argue that Mr. Desper's substantive due process claim fails because, in their view, he failed to show a protected liberty interest. *See* Response Br. 41. To the extent such an interest is required, Mr. Desper has shown one. *See supra* Section II.A.1.

then argue that Mr. Desper failed to show arbitrary government action because he failed to allege facts plausibly showing intent to injure. Response Br. 41–42. Defendants are wrong on both the law and the facts.

Defendants start off on the wrong foot by arguing that Mr. Desper "must show conduct 'intended to injure in some way.'" Response Br. 42 (quoting *Hawkins*, 195 F.3d at 742). Mr. Desper's allegation that VDOC admitted "there was no specific reason" for the visitation denial, JA300, plausibly satisfies even Defendants' intent standard, particularly when taken together with his allegation of disparate treatment, *see infra* Part III. But in any event, intent to injure does not represent a floor for conscience-shocking behavior. In *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), the Court described intentional behavior as "the sort of official action *most likely* to rise to the conscience-shocking level," *id.* at 849 (emphasis added), but explicitly acknowledged that injuries resulting from "less than intentional conduct" were likewise actionable under the Fourteenth Amendment, *id.* at 849 (internal quotation marks omitted). "[P]ower exercised 'without any reasonable justification in the service of a legitimate governmental objective'" meets this threshold. *Hawkins*, 195 F.3d at 746 (quoting, *Lewis*, 523 U.S. at 846). Mr. Desper plausibly

alleged that Defendants had no reasonable justification for denying him visitation with his daughter. *See supra* Section I.A.

Defendants then once again discount the strength of Mr. Desper's factual allegations. Avoiding the substance of Mr. Desper's allegation that VDOC stated "there was no specific reason" for the denial of his applications, JA300, they argue that the allegation relies on hearsay. *See* Response Br. 41. But Defendants cite no case allowing this Court to disregard such an allegation on a Rule 12(b)(6) motion, where it must accept factual allegations as true. *See Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999); *see also Allen v. City of New York*, No. 18-CV-9663, 2020 WL 4287361, at *3 n.1 (S.D.N.Y. July 27, 2020) ("[C]ourts may consider hearsay statements on a motion to dismiss because the Court must accept as true all factual statements alleged in the complaint."). Nor do Defendants address the statement's eventual admissibility, for example as non-hearsay or through an exception to the hearsay rule.[16]

[16] In making the alternative argument that Mr. Desper's "no specific reason" allegation fell short of arbitrariness because there were plausible reasons VDOC might have had for the denial, *see* Response Br. 41–42, Defendants once again turn the 12(b)(6) standard on its head by drawing

Defendants also argue that Mr. Desper's attempt to show arbitrariness by comparing his restrictions to the lesser restrictions placed on those who have previously escaped prison "is unhelpful because the concern underlying the policy" here is that people "with a history of sexually abusing children may sexually abuse a child during an in-person visit." Response Br. 42 n.14. To the contrary, that comparison highlights the contrast between the maximum two-year restrictions on contact visits for inmates who have committed serious misconduct, even escape, *see* JA48, and the five-year-and-counting restriction on *all* forms of visitation Defendants have imposed on Mr. Desper—a person who has never committed any offense against his child, let alone while she was visiting him in prison. *See* Opening Br. 33.

Furthermore, Defendants suggest that, in light of the "scarce and open-ended" guideposts in the area of substantive due process, this Court should be reluctant to recognize Mr. Desper's claim. Response Br. 43 (quoting *Hawkins*, 195 F.3d at 738). Far from a sweeping theory of liability that would open the floodgates to claims, however, Mr. Desper's

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inferences in their own favor, not Mr. Desper's, *see supra* Sections I.A, II.A.2.

claim relies on specific allegations that prison officials denied him all forms of visitation with his minor daughter indefinitely for no legitimate reason. *See supra* Section I.A.[17] All he asks is relief from an ongoing, arbitrary restriction on his parental rights.

## III. Defendants Fail to Explain Why Mr. Desper's Allegations of Disparate Treatment Are Insufficient to State an Equal Protection Claim.

Defendants argue that Mr. Desper's equal protection claim fails because he plausibly alleged neither disparate treatment nor intentional discrimination and that, in any event, VDOC's decision to deny him an exemption survives rational basis review. Response Br. 44–45. These arguments hold Mr. Desper to a higher standard than Rule 12(b)(6) mandates.

First, Defendants concede that Mr. Desper alleges disparate treatment compared to other individuals with similar or worse criminal

[17] Defendants warn of a separate floodgates concern whereby inmates could "avoid a motion to dismiss by strategically leaving out [VDOC's] reason for denying an exemption from the pleadings." Response Br. 42 n.14. But here, Mr. Desper alleged facts *affirmatively showing* that Defendants had no specific reason for denying him visitation with K.D. And courts are already empowered to filter out pleadings "not entitled to the assumption of truth" because they rely on no more than legal conclusions. *Iqbal*, 556 U.S. at 679.

histories, but argue that he should have made additional allegations about those individuals' mental health evaluations. Response Br. 45. Yet disparate treatment can be plausibly inferred from those other individuals' criminal histories alone. And while focusing exclusively on what Mr. Desper has *not* alleged, Defendants fail to acknowledge that "those [other] offender's mental health evaluations" are wholly within VDOC's control. Response Br. 45–46. At the pleading stage, then, Mr. Desper has "had no opportunity to demonstrate that others similarly situated in this regard were not treated similarly." *Willis v. Town of Marshall*, 426 F.3d 251, 263 (4th Cir. 2005).

Second, Defendants claim that Mr. Desper's complaint did not include any "well-pled allegation that [VDOC's] differential treatment was the result of intentional or purposeful discrimination." Response Br. 46 (internal quotation marks omitted). At the Rule 12(b)(6) stage, intent can be reasonably inferred from Mr. Desper's allegations that VDOC was treating him differently from comparable incarcerated parents even though they were all subject to the same visitation policy. *See Fauconier v. Clarke*, 966 F.3d 265, 278 (4th Cir. 2020) (holding that plaintiff adequately pleaded differential treatment and intentional discrimination

by alleging that prison officials required him to reapply for his job after he was hospitalized but did not do so for other inmates in his medical classification); Opening Br. 43. And Defendants' speculation on whether or how Mr. Desper's fleeting references to his own mental health *could* have justified VDOC's decision-making is irrelevant at the pleading stage. *See supra* Section II.A.2 (explaining that the appropriate question is whether it is plausible that VDOC acted arbitrarily, not whether it is plausible that VDOC acted justifiably).

Finally, Defendants employ the wrong legal standard when they argue that VDOC's decision to grant some individuals an exemption to the visitation policy while denying Mr. Desper an exemption survives rational basis review. *See* Response Br. 47–48. In the prison context, this Court uses the *Turner* factors to determine whether disparate treatment survives rational basis review—not the "any reasonably conceivable state of facts" standard Defendants identify. *See* Response Br. 47 (internal quotation marks omitted); *Fauconier*, 966 F.3d at 277–78. But in any event, there is insufficient information in the limited record at the 12(b)(6) stage to evaluate—let alone support—Defendants' attempts to justify differential treatment. *See Wilcox v. Brown*, 877 F.3d 161, 169 (4th

Cir. 2017) ("[I]t is not the courts' role to simply invent possible objectives that [d]efendants have not even claimed were the basis for [disparate treatment].").

## CONCLUSION

For the foregoing reasons, this Court should reverse the judgment below and remand for further proceedings.

Respectfully Submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 5,749 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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## CERTIFICATE OF SERVICE

I, Nicolas Sansone, certify that on January 8, 2021, a copy of Appellant's Reply Brief was served on counsel for Appellees via the Court's ECF system.

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